1989 CarswellPEI 15
Prince Edward Island Supreme Court, Trial Division

Matheson v. Coughlin

1989 CarswellPEI 15, 20 M.V.R. (2d) 102, 244 A.P.R. 91, 78 Nfld. & P.E.I.R. 91

MATHESON v. COUGHLIN et al.

Campbell J.

Heard: November 16 and 17, 1988 and June 29, 1989
Judgment: October 2, 1989
Docket: Doc. No. GDS-1114

Counsel: *B.B. Taylor, Q.C.*, for plaintiff.
G.A. Lyle, A.K. Scales, Q.C. and *J.K. Clark*, for defendants.

Subject: Public; Property; Torts; Civil Practice and Procedure; Estates and Trusts; Evidence

Headnote

Animals --- Duty of motorist towards horse-drawn vehicle or rider

Animals --- Bailment and hire — Horses

Limitation of Actions --- Actions in tort — Specific actions — "Damages occasioned by motor vehicle"

Motor Vehicles --- Evidence — Actions in tort — Statutory presumption of negligence — Effect on pleadings

Limitations — Sled swivelling into path of oncoming vehicle — Action "occasioned by motor vehicle" — Six-year limitation period therefore applicable — Traffic Act, R.S.P.E.I. 1974, c. H-6, s. 274(1) — Statute of Limitations, R.S.P.E.I. 1974, c. S-7, s. 2(1)(d).

Negligence — Animals on highway — Sled and horse — Snowmobile "spooking" horse — Sled swivelling into path of oncoming truck — Operators of sled, snowmobile, and truck all negligent — Parents of operator of sled also liable — Action allowed.

Negligence — Snowmobiles — Animals on highway — Sled and horse — Snowmobile "spooking" horse — Sled swivelling into path of oncoming truck — Operators of sled, snowmobile, and truck all negligent — Parents of operator of sled also liable — Action allowed.

The infant plaintiff was a passenger in a sled being towed by a horse when it was involved in a collision with a truck. The facts indicated that the sled consisted of two parts. The front portion was connected to the rear portion by means of a connecting-bar which was hooked to the front portion. The rear portion could swivel from side-to-side.

The sled was being operated by a 17-year-old youth, who was seated in the front portion. The infant plaintiff was seated in the rear portion. The horse was spooked by a snowmobile, which passed the sled from the rear. The horse pulled the sled toward the ditch beside the highway and the sled swivelled into the path of an oncoming truck.

The infant plaintiff sued the operators of the snowmobile and truck as well as the parents of the youth who was in control of the sled. She also sued the youth herself.

Held:

The action was allowed.

The youth operating the sled was negligent in taking the infant plaintiff onto a slippery highway on a sled. She thereby exposed her passenger to a foreseeable danger and thus failed in her duty of care. The youth's parents were also negligent in failing in their duty to prevent and stop the journey from continuing.

The operator of the snowmobile was negligent in passing the sled on four successive occasions. He ought to have known that such actions would foreseeably excite the horse, thus making him more difficult to handle.

The operator of the truck was negligent in failing to drive sufficiently to his right when meeting the pony-drawn sled.

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Negligence was properly apportioned as follows: 70 per cent to the operator of the sled and her parents, 20 per cent to the operator of the snowmobile, and 10 per cent to the operator of the truck.

Table of Authorities

Cases considered:

Bruell Float Service Ltd. v. Ontario Hydro-Electric Power Comm., [1976] 1 S.C.R. 9, 55 D.L.R. (3d) 236, 3 N.R. 508 — *referred to*

Heppel v. Stewart, [1968] S.C.R. 707, 69 D.L.R. (2d) 88 — *followed*

Kuipers v. Gordon Riley Transport (1967) Ltd. (1976), 1 C.C.L.T. 233 (Alta. T.D.) — *referred to*

MacKinnon v. Hashie (1980), 28 Nfld. & P.E.I.R. 155, 79 A.P.R. 155 (P.E.I. S.C.) — *referred to*

Ryan v. Hickson (1974), 7 O.R. (2d) 352, 55 D.L.R. (3d) 196 (H.C.) — *considered*

Statutes considered:

Highway Traffic Act, R.S.O. 1960, c. 172 —

s. 147(1)

Highway Traffic Act, R.S.P.E.I. 1974, c. H-6 —

s. 188

s. 271

s. 274(1)

Off-Highway Vehicle Act, R.S.P.E.I. 1974, c. O-1 —

s. 12(1)

Statute of Limitations, R.S.P.E.I. 1974, c. S-7 —

s. 2(1)(d)

s. 5

Authorities considered:

Fleming, J.G., *The Law of Torts*, 5th ed. (Sydney: Law Book, 1977).

ACTION for damages for personal injuries sustained in motor vehicle accident.

***Campbell J.*:**

1 Tanya Matheson, an infant by her Guardian ad litem, claims damages for the personal injuries she suffered on January 1, 1982, when, as a gratuitous passenger, she fell from a pony-driven bobsled as it slew into collision with an oncoming truck on the Conway Road. The chain of events which led to the injuries are said to have been caused by acts of negligence by each of the defendants.

2 Questions of liability only are raised on this trial, with damages reserved for another day.

Statute of Limitations

3 Mr. Clark, on behalf of the defendants Cheryl, Alfred, and Reby Bridges, noted that this action was commenced against them on December 31, 1987, nearly 6 years after the cause of action arose. It is his submission that the action is barred by the 2-year limitation set out in s. 2(1)(d) of the *Statute of Limitations*, R.S.P.E.I. 1974, c. S-7. That section reads as follows:

2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

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. . . . .

(d) actions for trespass to the person, assault, battery, wounding or other injury to the person, whether arising from an unlawful act or from negligence, of for false imprisonment, or for malicious prosecution or for seduction, within two years after the cause of action arose.

4 Mr. Taylor submits that the governing statutory limitation is 6 years as set out in s. 274(1) of the *Highway Traffic Act*, R.S.P.E.I. 1974, c. H-6. That section states:

274(1) Subject to the provisions of this section no action shall be brought against a person for the recovery of damages *occasioned by a motor vehicle* after the expiration of six years from the time when damages were sustained.

[Emphasis added.]

5 This action was commenced against the defendants, Bridges, barely within the 6-year period. The question is which statutory provision prevails. There is no doubt that the injuries suffered by the plaintiff were the result of her collision with the truck driven by the defendant Roland Adams. In my view, therefore, the plaintiff's damages were occasioned by a motor vehicle. A provision of the *Highway Traffic Act* of Ontario, R.S.O. 1960, c. 172, s. 147(1) similar to s. 274(1), supra, was considered by the Supreme Court of Canada in *Heppel v. Stewart*, [1968] S.C.R. 707, 69 D.L.R. (2d) 88, where the limitation period of that Act was upheld. At pp. 709-710 [S.C.R.], Martland J. stated:

The Court of Appeal held that the provision applied only if the legal basis of the claim is the use or operation of the motor vehicle.

With respect, I do not agree with this interpretation of the subsection. It does not purport to apply only to causes of action of a particular nature. It does not refer to the use or operation of a motor vehicle. It states specifically that *no action* shall be brought to recover damages occasioned by a motor vehicle. If a motor vehicle is the occasion for the damage, i.e., if it is the vehicle which brings it about, then the limitation period applies.

[Emphasis added.]

6 Although a few exceptions have been judicially pronounced, such as when the damages arise out of contract (see: *Bruell Float Service Ltd. v. Ontario Hydro-Electric Power Comm.*, [1976] 1 S.C.R. 9, 55 D.L.R. (3d) 236, 3 N.R. 508), I am satisfied that the provisions of the *Highway Traffic Act* apply in the circumstances of this case and I therefore find that the defendants Bridges have been lawfully joined as parties within the prescribed 6-year limitation period.

7 Mr. Clark made further reference to s. 5 of the *Statute of Limitations*, which I believe is also answered by the application of the *Highway Traffic Act*.

The Facts

8 I turn now to a consideration of the facts. At the commencement of this trial, Mr. Taylor offered an overview of the plaintiff's case and gave a resume of the allegations of negligence to be considered in the case. His opening remarks bear repetition here:

MR. TAYLOR: The accident which resulted in horrible injuries to my client arose from the most innocent seeming of circumstances. On a pleasant winter day, a 17 year old girl takes 2 small children for a horse and sleigh ride. At the same time, a man is taking his daughter and other small children for snowmobile rides. Another man is coming home from work. No one had improper intentions. No one was being consciously reckless. In fact, in their minds, everyone no doubt felt that they were doing a good thing or at least a reasonable thing. The Bridges' [sic] were giving excitement and pleasure to 2 small children by giving them a sleigh ride. Mr. Coughlin was giving excitement and pleasure to a number of small children by giving them snowmobile rides. And after working 16 hours out of the last 24, Mr. Adams just wanted to get home. Nevertheless, the accident occurred and it didn't occur because of an act of God. It occurred because of negligence. Whose negligence? It certainly wasn't Tanya Matheson's negligence. She was only 7 years old. It wasn't negligent to her to want to go on a sleigh ride, any little girl would, and no one suggests, and particularly none of the defendants suggests, that she

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was negligent. So who then was negligent? Well, what did the defendants say in their statements of defence? Mr. Coughlin, the snowmobile driver, says he wasn't negligent. He says that any damage was caused by the negligence of the defendant, Cheryl Bridges, who drove the horse, or her father, Alfred Bridges, or the defendant, Roland Adams, who drove the truck.

Roland Adams says he wasn't negligent. He says the damage was caused by the defendant, Arthur Coughlin, or the defendant, Cheryl Bridges. Alfred and Reby Bridges and their daughter, Cheryl Bridges simply say they weren't negligent.

In fact, all of the defendants were negligent. They were negligent because they failed to direct their minds towards the hazards which their actions could cause. They failed to comprehend the potential consequences of their actions. To comprehend the potential consequences of their actions, it was this lack of thought or understanding which led them to do what they did and the separate actions which each of them took contributed to the causation of this accident. The causation of this accident seems to be an unbreakable chain of events leading to the accident. Remove any link and the accident will not happen. Had any one of the defendants not been negligent, this accident would not have happened. If Mr. and Mrs. Bridges had refused permission for the sleigh ride, this accident would not have occurred. If they had properly supervised and instructed their daughter, Cheryl, she wouldn't have been out on the highway with a horse, a 2-part sled and 2 small children. If they had properly instructed her in how to drive a horse, this accident would not have happened. If Cheryl Bridges had properly refused to take the 2 small children on the highway herself, this accident would not have happened. If after the horse was scared twice by the snowmobile with no one being injured, Cheryl had told the children to get off and had led the horse the rest of the way, this accident would not have happened. If Mr. Coughlin hadn't taken his snowmobile on the highway contrary to the law, this accident would not have happened. If Mr. Coughlin hadn't persisted in buzzing past the horse again and again on his snowmobile without any care as to what it was doing to the horse, this accident would not have happened. And then as the horse and sleigh were within feet of their destination without mishap, Mr. Adams came on the scene. If he'd been properly watchful, this accident would not have happened. If he had only stopped for a moment instead of attempting to push on past to home, to push on past the out of control horse, this accident would not have happened.

My Lord, I don't doubt that you will have a difficult time picking the thread of truth from among the conflicting versions of the facts which will be presented to you. This case is out of the ordinary in that the witnesses who saw the most are all defendants with a great interest in protecting themselves. Even the witnesses who are not defendants are tied in with the defendants and indeed with the plaintiff by blood relationships or through friendships. The fact that there are 4 lawyers in this room My Lord suggests that the witnesses' testimony will be pulled this way and that through examination and cross-examination and so on. I'm confident, however, that at the end of it all when Your Lordship asks the question 'Did each of these defendants do what they should have done?' your answer will be, 'No, none of them did.' And when you ask the further question, 'Did their failures contribute to the cause of this accident?' your answer will be, 'Yes, all of them did.'

9 As will be seen, each allegation of negligence rests upon different facts and considerations of law. For convenience, I propose to assess the allegations of negligence against the defendants in the following order:

10 (a) Cheryl Bridges, the driver of the pony and bobsled;

11 (b) Alfred and Reby Bridges, the parents of Cheryl Bridges;

12 (c) Arthur Coughlin, the operator of the snowmobile;

13 (d) Roland Adams, the operator of the 1/2-ton truck.

I Was Cheryl Bridges Negligent in Causing the Plaintiff's Injury?

14 I make a finding of the following facts which appear to be relevant to this question. On January 1, 1982, Cheryl Bridges, aged 17, was at home with her parents Alfred and Reby Bridges, a 49-acre property located on the north side of the Conway Road. Also present were Cheryl's 7-year-old sister Michelle and the plaintiff, Tanya Matheson, a second cousin, then 7 years of age. Tanya had arrived with an aunt, Jennie Bridges, some time after noon for a visit. Tanya had expressed a desire to go for

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a sleigh ride on Alfred Bridges' pony and bobsled. Mr. Bridges owned a Welsh pony, which he had purchased 2 years earlier for work in the woods. The pony, named Barney, was then 8 years old, 3 1/2 feet high at the shoulders and mild-tempered. Mr. Bridges had taught Cheryl how to properly harness Barney and had full confidence in her ability to drive the pony. Cheryl had taken the pony to the woods some 15 times prior to January 1, 1982, and had driven Barney with the bobsled on the Conway Road on five or six previous occasions, without mishap. Barney would on occasion follow Cheryl around the property, and would balk at anyone other than Cheryl or Mr. Bridges taking control of him. I have concluded that insofar as horses or ponies can be trusted, Mr. Bridges was justified in placing his confidence in Cheryl's ability to manage and control the pony, Barney.

15 Tanya's initial requests for a sleigh ride were resisted, but eventually Reby Bridges indicated it wouldn't do any harm and, with Alfred Bridges' consent, Cheryl hitched Barney and took Tanya and Michelle for a ride. Mr. Bridges expected them to keep to the trail leading to the rear wood lot. Instead, Cheryl directed Barney out onto the Conway Road heading west along the shoulder of the road.

16 The bobsled consists of two parts. The front runners are joined to the rear runners by means of a connecting-bar which is hooked to the forward bob. The rear section swivels from one side to another. The two sections are stabilized when loaded with logs laid from front to back.

17 On this occasion, Cheryl positioned herself on the front bob. Tanya sat on the left of the rear bob and Michelle sat on its right. Barney proceeded at a quiet walk. Their intended destination was Henry Bridges' home, a distance of half a mile. The sleigh ride lasted half an hour until its abrupt ending.

18 It was a beautiful, mild, clear New Year's Day. The Conway Road was covered in snow-packed ice. Its surface was slippery. As Cheryl proceeded along the shoulder of the road, the defendant Arthur Coughlin was making the first of four trips carrying young passengers on his snowmobile along the same road. As he approached the sleighing passengers from the rear, he would pull out to the left and pass the pony and sleigh, then returning to the shoulder of the road, continuing in a westerly direction. On the first pass, Cheryl Bridges noted Barney twitching a little bit. On the second pass, Cheryl said Barney "gave a little quick movement. ... He just like run a couple of feet." At no time did Arthur Coughlin observe anything irregular in Barney's movements, nor did he look back to observe his demeanor. Cheryl's recollection of the third pass is too vague to rely on, as she is not certain whether there were three or four passes of the snowmobile from behind. To answer the obvious question on Mr. Coughlin's means of returning to the rear position, it was his practice to return to his father's yard on the south side of the Conway Road and from thence, with his next passenger, to make the circle another time. On the fourth and final pass, I find that Barney sauntered into the middle of the right lane, breaking into a brisk walk. This is the term given the pace of Barney's forward movement by witness Rene Arsenault, who observed the accident from his automobile at a distance of 300 feet as he approached from the east.

19 Cheryl Bridges had described the gait of the pony following the snowmobile's fourth pass and immediately before the impact with the following words: running, fast clip, pacing, faster than a trot, jumped around a little bit, not moving fast, and fast walk. She proved to be extremely susceptible to suggestion and I, therefore, accept Mr. Arsenault's description as being more objective and reliable. In fact, therefore, following the fourth pass of Mr. Coughlin's snowmobile, Barney moved off the shoulder of the road onto the right lane of the travelled portion of the road, while at the same time breaking into a brisk walk. Cheryl Bridges responded to this situation with an attempt to rein Barney back onto the right shoulder. The transcript at p. 94 reveals her recollection of the impending events on cross-examination by Mr. Lyle:

> Q. And yet you didn't sense any particular danger?
>
> A. No.
>
> Q. And even during this period of time you still didn't attempt to take him off the road, did you, with your, by trying to steer him off the reins when he was, after the skidoo had passed you before you saw the truck?
>
> A. Yeah, I was, had been trying to get him off the road.

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Q. I see, but he just wasn't —

A. He just wasn't listening.

Q. — responding to your command.

A. Yes.

Q. You say he wasn't listening — (unclear)

A. Well he just wasn't paying any attention to what I was doing.

Q. And were you pulling on the reins very hard or —

A. Yeah, it's the one towards the ditch I was pulling on quite hard.

Q. And but it was when he saw the truck he came over on his own?

A. Yes.

Q. Not as a result of anything that you did?

A. No.

Q. Did he come quickly?

A. Yes.

Q. Very quickly?

A. Yes.

Q. So it was the sight of the truck that caused him to go quickly towards the ditch?

A. Yes.

20 Cheryl Bridges was pulling quite hard on Barney's right rein, with no apparent response from the pony, when Mr. Roland Adams' truck rounded the turn approaching the pony and sleigh in the opposite or eastbound lane of traffic. At this critical moment, the pony pulled toward the right-hand ditch, causing the rear bob to swivel across the centre of the road into the oncoming truck. The impact of the collision threw the plaintiff Tanya Matheson and Michelle Bridges to the ground. Cheryl Bridges cannot recall how she left the front bob but was soon on her way to a neighbouring home to call an ambulance.

21 The defendant Roland Adams is the last of three persons to testify as to the events immediately preceding the collision. He testified that the pony was walking west in the opposite lane of traffic, with "not too much control on him," when, without notice, it pulled toward the ditch causing the rear bob to swerve into the front-left fender of his truck. The evidence of all three eyewitnesses supports a conclusion, but for the swivelling motion of the rear bob, the accident would not have happened. I have concluded that the swivelling of the rear bob was the result of the pony's response to Cheryl Bridges' pull on the right rein and the sudden appearance of the Adams truck on the scene. These two elements caused Barney suddenly to pull toward the ditch on the right.

22 The question remains whether the foregoing sequence of events discloses negligence on the part of Cheryl Bridges.

23 I am of the opinion that negligence is disclosed. Not in the manner in which Cheryl managed the pony, but in the fact that she exposed the plaintiff to a risk which she knew, or ought to have known, attended the sleigh ride described above. Cheryl

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was aware of the presence of Arthur Coughlin's snowmobile on the roadway soon after she took Barney and her passengers out onto the shoulder of the Conway Road.

24 The unpredictable nature of animals, coupled with the slippery road conditions, and the unsafe characteristics of the swivelling bobsled, combine to attest to predictable and probable elements of danger which ought to have been known to Cheryl Bridges and, in exposing Tanya Matheson to this certain danger, I find negligence on the party of Cheryl Bridges.

25 The driver of a horse and sleigh may rein the horse with great skill, but if the driver knowingly drives on thin ice and breaks through, then he discloses negligence in placing his passengers at risk, notwithstanding his deft handling of the reins. In the instant case, Cheryl Bridges' experience and skill in managing Barney does not excuse her negligence in exposing the plaintiff to the inherent risks of the bobsled ride upon a highway. Those risks led to Tanya's injuries.

26 In my opinion, having undertaken to provide a sleigh ride to Tanya, a gratuitous passenger, Cheryl Bridges owed a duty of care to her young passenger. In taking Tanya onto a slippery highway on a bobsled, Cheryl exposed her passenger to a foreseeable danger and thus failed in her duty of care to the defendant.

II Were Alfred and Reby Bridges Negligent in Causing the Plaintiff's Injury?

27 Cheryl Bridges had not reached the age of majority when Tanya Matheson was injured. Reby and Alfred Bridges are the parents of Cheryl. Both had given their consent for the sleigh ride. Alfred Bridges owned the pony and the sleigh. In giving his consent to a sleigh ride, Alfred Bridges assumed his daughter would take Tanya and Michelle along the trail to the wood lot at the rear of his property. Mr. Bridges knew that Cheryl had taken the pony and her young passengers out onto the Conway Road on this occasion. He was apprehensive of what might happen in proximity to the snowmobile. He thought there was nothing he could do:

> Q. I assume that they must have hitched up the horse and the sled. Did you assist them with this?
>
> A. No, I didn't.
>
> Q. Did you see them doing it?
>
> A. No I didn't.
>
> Q. Where were you during this time?
>
> A. I was sitting in the livingroom.
>
> Q. Were you watching television or talking to somebody or —
>
> A. Yes, watching television and talking to my mother-in-law and my brother-in-law.
>
> Q. I see. Now at some point they left the area of the barn and the evidence is that they proceeded to the road. Did you see them go?
>
> A. No, you couldn't see them from where I was in the house because on that side of the house next to the driveway there is [sic] no windows.
>
> Q. I see. And your wife testified that she subsequently saw them on the road in the area of the railway tracks?
>
> A. Yes, I had seen them at that time myself.
>
> Q. You saw them yourself?
>
> A. Yes, at that time.

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Q. So was that the first knowledge that you had that they were going out onto the road?

A. Yes.

Q. And did you have any — *Were you concerned when you saw that*?

A. *A bit, yes*.

Q. *Why was that?*

A. *Well I had heard the skidoo come down and turn and go by and which I had never seen the pony around a skidoo before, had never had him around a skidoo before*.

Q. Yes.

A. *I didn't know what his reaction would be*.

Q. Mmhm. *But you didn't do anything?*

A. *Well there wasn't much I could do because they were too far away for me to holler for them to come back*.

[Emphasis added.]

28 It appears from the transcript that the defendant Reby Bridges was also aware that Cheryl had taken Barney and the children for a sleigh ride on the road. Reby Bridges, on direct examination by Mr. Taylor, pp. 150-151:

Q. We've had testimony that they went out to the barn, they would have hitched up the horse and sleigh. Do you recall seeing that?

A. No, I didn't see them hitching it or anything like that.

Q. Do you recall seeing them going?

A. No, I didn't see them going. The first I saw of them on the road was when the skidoo went down the first time. I went out and looked; and they were quite a distance up the road, maybe nearly to the railroad tracks.

Q. On your side of the railroad tracks?

A. Yes.

Q. Going towards the Western Road?

A. On — right, right.

. . . . .

Q. Okay. You heard the skidoo, and you went to the front window, and you saw the horse and the sleigh and the kids I guess.

A. Yes. Well I couldn't see too much of the kids, but I did see the horse and Cheryl. You know, there is [sic] a few trees.

Q. Yes. And did you do anything at that time?

A. No, I didn't. I just thought Cheryl could — she had been up the road before and had had the pony out on numerous occasions, and I didn't think there was any reason to, you know, to go after her or anything.

Q. I presume then you returned to making supper?

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A. Yeah, supper, mmhm.

29 The plaintiff asserts that Mr. and Mrs. Bridges failed in their duty to supervise and control their child as well as failing to assess their child's ability to assume responsibility and carry out the sleigh ride upon the highway. The plaintiff further submits that Mr. and Mrs. Bridges ought to have known of the dangerous nature of the sleigh, and ought not to have allowed the same to be taken out on the highway with the two young passengers. Mr. Taylor referred to *Ryan v. Hickson* (1974), 7 O.R. (2d) 352, 55 D.L.R. (3d) 196 (H.C.), in which Goodman J. observed, at p. 206:

> The law is well settled that a parent is not liable in damages for the torts of his child committed without his knowledge, consent or sanction and not in the course of his employment of the child: *Eversley's Law of the Domestic Relations*, 4th ed. (1926), p. 581; 21 Hals., 3rd ed., p. 150, para. 335. Where, however, a child causes injury to others by the use of dangerous things, the parent or any other person in charge of the child may be liable if the parent or other person has control of the dangerous thing which causes the injury or is negligent, either in permitting the child to use a thing which is dangerous in itself or *known to be dangerous or capable of causing danger to others*, or in not exercising proper control and supervision of the child (Halsbury's Laws of England, same citation as above). Parents are required to supervise their children reasonably, although they are not vicariously responsible on the ground of their family relationship alone: Linden — *Canadian Negligence Law*, p. 24; *Thibodeau v. Cheff* (1911), 24 O.L.R. 214 at p. 218.
>
> To put it in another way, 'Without going so far as to attach vicarious liability, the common law insists that parents at least exercise reasonable care, commensurate with their peculiar ability to keep their offspring under discipline and supervise their activities for the sake of public safety': Fleming, *The Law of Torts*, 4th ed. (1971), at p. 147. That is to say a parent may incur responsibility for failing in his personal duty to control the child's activities. The standard exacted by the law is that of reasonable care and has regard to the practices and usages prevailing in the community and the common understanding of what is practicable: *Hatfield v. Pearson* (1956), 6 D.L.R. (2d) 593, 20 W.W.R. 580.

30 And at p. 208:

> Although a snowmobile is not per se a dangerous thing, I am of the opinion that it is a thing which is known to be dangerous or capable of causing danger to others. Although a snowmobile is not a weapon, its careless use makes it just as dangerous as a weapon in so far as the personal injury it can cause and, indeed, even more dangerous in so far as the property damage it can cause. I am of the opinion that it is an act of negligence to give to a young boy care and control of a snowmobile which is a thing known to be dangerous or capable of causing danger to others, unless it is proved (a) that he was properly and thoroughly trained in its use, with particular regard to using it safely and carefully, and (b) that the boy was of an age, character and intelligence such that the father might safely assume the boy would apprehend and obey the instructions given to him (see *Starr et al v. Crone*, [1950] 4 D.L.R. 433 at p. 438, [1950] 2 W.W.R. 560, per Wilson, J., which case dealt with the matter of a father allowing a son to use an air rifle).
>
> In so far as a snowmobile is concerned, I am of the opinion that the parent must, in addition to the above requirements, prove not only that he could safely assume that the child would apprehend and obey the instructions given to him, but that he was physically capable of safely following those instructions and also of safely operating the vehicle: *School Division of Assiniboine South No. 3 v. Hoffer et al.* (1971), 21 D.L.R. (3d) 608, at p. 612, [1971] 4 W.W.R. 746, 1 N.R. 34 [affirmed [1973] S.C.R. vi, 40 D.L.R. (3d) 480*n*, [1973] 6 W.W.R. 765].

31 And at pp. 210-211:

> In addition, thereto, I find that both fathers were negligent in that they failed to exercise any supervision or control over the activities of their respective sons in the use of the snowmobiles on the day upon which the accident occurred and on all other days after they were satisfied that the boys had mastered the mechanical operation of the vehicles.

32 Mr. Clark, for the defendants Reby and Alfred Bridges, stresses six points:

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(1) The pony and bobsled were not inherently dangerous;

(2) Cheryl's driving on the road was in violation of the mutual understanding between Cheryl Bridges and her parents;

(3) Alfred and Reby Bridges did not expressly or impliedly consent;

(4) In driving the pony and sled upon the road, Cheryl Bridges was not acting as servant or agent of her parents;

(5) The actions taken by Cheryl were completely unforeseeable;

(6) Cheryl Bridges' competence to handle the pony and sled should not have caused her parents any apprehension of possible harm.

33 The standard of care required of parents for the tortious actions of their children is stated by Fleming, J.G., *The Law of Torts*, 5th ed. (Sydney: Law Book, 1977) at p. 670:

> The standard exacted by law is that of reasonable care and has regard to the practices and usages prevailing in the community and the common understanding of what is practicable. This requires a weighing of the risks to others which the child's conduct involves against the competing need, to which courts have been much alive, of giving those growing-up sufficient scope to develop a sense of personal responsibility and reasonable latitude in pursuing forms of amusement and activity not necessarily restricted to those alone that are *perfectly* safe and harmless. On the other hand, when tolerating the use of dangerous objects or activities, parents must at the very least ensure that the child receives proper instruction in using them safely and carefully, that he understands and heeds such instruction and is physically capable of following it safely.

34 Further, at p. 671:

> The liability being personal, not vicarious, requires proof of negligence in the parent, but not at all to the child.

35 I have earlier determined that the use of a public highway with a pony-driven bobsled for the conveyance of 7-year-old children on the rear bob is an inherently dangerous activity — one that presents a predictable and probable risk to the infant passengers. I will concede that the danger is lessened if the infant passengers are removed and only a driver is conveyed on the front bob. I would also agree that if the bobsled were made rigid by means of chains or fastenings or logs, that the risk of the rear bob swerving is lessened.

36 I find that both Reby and Alfred Bridges knew that the bobsled ride on the Conway Road was dangerous or capable of causing danger to the infant passengers and they both failed in their duty to prevent and stop the journey from continuing. Their automobile was in their yard — the means of transport used by them 1/2 an hour later to travel to the accident scene. Mr. Bridges could have and ought to have gone after Cheryl and brought the pony and bobsled home. There is no convincing evidence that Cheryl Bridges had a mutual understanding with her parents that she would not take the sled upon the highway. Indeed, her parents refer to her previous five or six trips on the highway to justify their own confidence in her ability to manage the pony. Cheryl's general competence in handling Barney is not in issue here. Notwithstanding her general competence in handling Barney around the farm, she embarked on a trip, with the consent of her parents, which was inherently dangerous. In my opinion, negligence lies with both Reby and Alfred Bridges in having allowed the ride to continue in spite of Mr. Bridges' concern that the pony, Barney, had never been "around a skidoo before".

III Was Arthur Coughlin Negligent in Causing the Injury?

37 It is admitted that the defendant Arthur Coughlin was operating a snowmobile upon a highway in contravention of s. 12(1) of the *Off-Highway Vehicle Act*, R.S.P.E.I. 1974, c. O-1. Mr. Coughlin was charged with and convicted of the offence.

38 A snowmobile is included in the definition of motor vehicle in the Price Edward Island *Highway Traffic Act* and the provisions of the *Highway Traffic Act* apply to the ownership and operation of snowmobiles unless otherwise specifically

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regulated by the *Off-Highway Vehicle Act*. In addition to the breach of the *Off-Highway Vehicle Act*, the plaintiff alleges a second element of negligence on the part of Arthur Coughlin in his failure to exercise reasonable precaution to avoid injuring an animal, contrary to s. 188 of the *Highway Traffic Act*. That section provides:

> 188. The driver of a motor vehicle shall, when upon a highway and approaching or passing an animal, exercise reasonable precaution to avoid injuring the animal.

39 In addition to the allegations of statutory law breach, the plaintiff is essentially saying that the defendant Arthur Coughlin startled or spooked the pony, Barney, with the repeated passes of his snowmobile, thus causing the spooked pony to hasten its pace and move into the right (and proper) half of the travelled portion of the roadway, thus placing the bobsled within reach of oncoming traffic in the event of a swing into the opposite traffic lane.

40 Mr. Lyle, for the defendant Coughlin, submitted that even if the actions of Mr. Coughlin caused Barney to move toward the centre of the road (which is denied), there was ample time for Cheryl Bridges to bring the pony back to the shoulder of the road.

41 The defendant states that the snowmobile was not a proximate cause of the accident and attributes the cause entirely to the Bridges and to the operator of the truck, Roland Adams.

42 Arthur Coughlin described the manner in which he passed the pony on the fourth and final pass (transcript, p. 226):

> Q. And could you for the court, just to make sure we have it right here, could you describe what that manner was? How you passed it.
>
> A. Well I just — When I came off the brow, I'd leave a space between me and the pony, and go around, and come back in again, back into the brow, after I got up a ways.
>
> Q. And did you look back to see whether anything had happened this time?
>
> A. No, I never looked back. Just when I was going by, didn't seem to be anything bothering the pony or anything.
>
> Q. I see. And did you accelerate as you had in the past?
>
> A. Yeah.
>
> Q. As you were going by?
>
> A. Yes.
>
> Q. And how far away from the horse and sleigh would you have been on these occasions when you passed them?
>
> A. Three feet.
>
> Q. About three feet?
>
> A. Probably around there.
>
> Q. So you would still have been in the right hand lane quite close to the side of the road?
>
> A. Yes.
>
> Q. Is there anything about the sound which your snowmobile makes which makes it different from an ordinary snowmobile?
>
> A. No.

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Q. Would it be fair to say then that your snowmobile makes a sound of course like other snowmobiles, but also perhaps like a motorcycle? A high pitched whining sound?

A. No. My snowmobile don't — I drive a motorcycle and the motorcycle is noisier.

Q. I see.

43 The transcript provides only scant clues as to the distance and approximate elapsed time between Alfred Coughlin's last pass of the pony and the scene of the accident. Rene Arsenault was approaching the pony and bobsled from the rear, and saw the collision. Although he appears to say on discovery that he saw the snowmobile, I am satisfied and so find that he did not. I accept Arthur Coughlin's evidence as to the distance between where he passed the pony and where he met the approaching truck of Roland Adams. He estimated the distance to be 275-300 yards, at a curve in the Conway Road. This is consistent with Mr. Roland Adams' estimate that the distance between the accident scene and the point at which he met the snowmobile was 300-400 feet. In my opinion, taking these distances into account, it would seem reasonable that it would take the pony and the truck less than 1 minute to close the distance between them, after the snowmobile passed on by.

44 As to whether Cheryl Bridges lost control of the pony — she maintained that she did not; both Rene Arsenault and Roland Adams stated that the pony did not appear to be out of control. Cheryl did, however, acknowledge that she could *not* rein Barney back to the right shoulder — although she was pulling on the right rein quite hard, Barney "was not listening to me". I take this evidence, by inference, to show that immediately prior to the collision, Barney had lost his usual composure and was not responding to familiar commands of the rein. In my opinion, Barney's momentary state of excitement was brought about by the combination of the passing snowmobile, followed by quite hard pulls on the rein and the sudden approach of an oncoming truck in the opposite lane. In his excitement, Barney failed to respond with his normal reflex. Instead, he darted away from the truck, to the right, causing the bobsled to slew across the centre of the road and into collision with the right-front fender and bumper (driver's side) of Mr. Adams' 1/2-ton truck. I therefore find that the defendant, Arthur Coughlin, created a condition which made control of Barney more difficult to manage, thereby contributing to the collision which followed. Mr. Coughlin ought to have known a snowmobile passing an animal on four successive occasions would foreseeably excite the pony, thus making him more difficult to handle. His actions, therefore, speak of negligence.

IV Was Roland Adams Negligent in Causing the Plaintiff's Injury?

45 Roland Adams had completed an 8-hour shift on the C.N. ferry at 2 p.m. and was driving to his home in Conway when the accident happened. His 1/2-ton truck was in good condition and carried sand in the rear, which Mr. Adams added every winter for greater driving safety, even though the added weight would add $15 a week to his gasoline bill.

46 The speed zone where the accident occurred was 60 km/h and Mr. Adams estimated his speed at 40 km/h prior to meeting the pony and sleigh. Mr. Adams said that when he entered the turn on the Conway Road, he saw the pony and sleigh some 150 feet ahead and pressed his brake a couple of times, slowing the speed of his vehicle to 25 km/h by his estimation, or "fairly near a crawl". Cheryl Bridges saw Mr. Adams' truck approaching at a speed she described as being "normal". Rene Arsenault saw the truck at and before collision and estimated the speed at 30-40 m.p.h. Arthur Coughlin met the Adams truck and described its speed as being "not very fast" and estimated it to be about 30 m.p.h.

47 As to the lateral distance between the sleigh and the truck, Rene Arsenault thought it was approximately 1-2 feet. Cheryl estimated the distance at 3 feet and stated that her rear passengers would be seated 5 feet behind her and as the rear bob swivelled around to meet the truck, Tanya would be 3-4 feet distant from the driver's position.

48 Neither Cheryl Bridges, nor Rene Arsenault, nor Roland Adams, saw anything immediately preceding the collision to forewarn of the impending collision, or to cause apprehension or concern that it might happen.

49 Section 271 of the *Highway Traffic Act* [P.E.I.] places the onus of proof upon Mr. Adams, the driver of a motor vehicle, to prove that the loss or damage did not arise through the negligence or improper conduct of himself:

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271 When loss or damage is sustained by any person by reason of a motor vehicle upon a highway the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner or driver is upon the owner or driver.

50 The plaintiff's reference to the pony careening down the middle of the road is not supported by the facts. The pony was proceeding, as I have earlier decided, in a brisk walk. The plaintiff submits that Mr. Adams ought to have come to a complete stop because the pony and sleigh were in the middle of the road and not under complete control. The plaintiff urges that in allowing only a 3-foot space between the pony and the truck, Mr. Adams left a margin of error far too small. Finally, the plaintiff says that 25 km/h was too fast a speed for the truck in the circumstances.

51 The defendant Adams says he did everything a reasonable driver ought to have done in the circumstances. Mr. Scales noted that Mr. Adams' standard of care, as stated by Lieberman J. in *Kuipers v. Gordon Riley Transport (1967) Ltd.* (1976), 1 C.C.L.T. 233 (Alta. T.D.) at 243, is not a standard of perfection; rather, it is that which would be exercised by a reasonable and prudent driver in that set of circumstances. (See review of MacDonald J. (as he then was) in *MacKinnon v. Hashie* (1980), 28 Nfld. & P.E.I.R. 155, 79 A.P.R. 155 (P.E.I. S.C.)).

52 In my opinion, the plaintiff has exaggerated the lack of control and speed and position of the approaching pony. There were no clear and obvious signs of lack of control or speed down the middle of the highway. Mr. Adams obviously felt that he had ample room ahead to meet the pony. His speed, in my opinion, was reasonable and his response to seeing the pony in slowing to 25 km/h was also reasonable.

53 Mr. Adams struck me as a credible witness, and one who exercised more than the usual care in the operation of his motor vehicle. It would not, in my view, be prudent or reasonable to suggest that Mr. Adams should have stopped his vehicle. Even had he stopped, the collision would probably still have taken place.

54 I do believe, however, that Mr. Adams ought to have given the pony and sleigh a wider berth, on the highway — a greater margin for safety. I find as fact that the sleigh and the truck were separated by a space of 3 feet. Since both sleigh and truck were in their respective lanes of traffic, and with the shoulder of the road cleared some 2 or 3 feet near the mailbox opposite the accident on Mr. Adams' right (see Alfred Bridges — cross-examination by Mr. Lyle, p. 273) there was opportunity for Mr. Adams to pull further than he did to the right shoulder of the road in meeting the pony and sleigh. It is probable that, had Mr. Adams allowed another foot or two, that the swivelling bobsled would not have come in contact with his truck. I find Mr. Adams negligent in failing to drive sufficiently to his right when meeting the pony-drawn sleigh.

V Contributory Negligence — Apportionment of Fault

55 Having found each of the defendants negligent to some degree in their actions, which negligence when taken together comprise the proximate cause of the accident, it is now my duty to apportion fault, if such is possible, to each of the parties. Mr. Taylor has proposed that the fault should be apportioned equally between the Bridges, Coughlin and Adams. I disagree. As far as Mr. Adams' negligence is concerned, I feel that his negligence, i.e., his failure to give more room to the pony and sleigh on his own side of the highway, was a minor infraction compared to the fault which must be attributed to the Bridges for their roles in setting a dangerous expedition in motion.

56 As for Mr. Coughlin, it was the repeated passes of the snowmobile which excited the pony. The first pass may not have been sufficient to prompt Barney's subsequent bolting, but Mr. Coughlin ought to have been more attentive to the responses of the pony to his snowmobile, and to the predictable and probable spooking effect his snowmobile would have upon the demeanor of the pony.

57 In these circumstances, I would attribute 70 per cent of fault to Cheryl, Reby, and Alfred Bridges, jointly and severally, 20 per cent to Arthur Coughlin and 10 per cent to Roland Adams.

58 I may be spoken to with regard to assessment of damages and the matter of costs.

Action allowed.

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